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No. 84-6646 (6)

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

NOV 22 PAGE 22

October Term, 1984

WILLIE LLOYD TURNER,

Petitioner,

v.

ALLYN R. SIELAFF, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

REPLY TO MOTION TO
STRIKE EX PARTE AFFIDAVIT

Now comes your Respondent, by counsel, and prays this Court to deny Petitioner's Motion to Strike the affidavit of Clyde Gibb, Clerk, Circuit Court of Northampton County, and further deny Petitioner's request to submit affidavits.

In his Motion to Strike, Petitioner concedes that he inserted in his opening Brief many factual statements which were not a part of the record in order to supply this Court with the "local flavor" which courts closer to the scene would already possess. (Motion, p. 1). These include Petitioner's references to the number of death sentences in Virginia, the racial composition of inmates on Virginia's death row, and cases in which the trial court imposed a sentence of life imprisonment after the jury had fixed punishment at death. (Petitioner's Brief, p. 31 and n. 6). As these assertions were readily verifiable, Respondent has accepted them, with the exception of the representation that Robert McClark was white, (Respondent's Brief, p. 26 n. 26), a fact which Petitioner now concedes was in error. (Motion, p. 2 n. 1). Equity and fundamental fairness

should dictate that Petitioner should not be heard to complain about that which he freely admits to having initiated.

The affidavit which Petitioner seeks to strike provides this Court with the actual racial makeup of the jury at Petitioner's trial. The racial composition of Petitioner's jury is an irrefutable historical fact which was open and obvious to everyone at Petitioner's trial.[1] While the fact of the composition of Petitioner's jury may not technically be within the scope of judicial notice, it is so close to it that it should be likewise accepted. This Court should apply the rule set forth in Muller v. Oregon, 208 U.S. 412, 421 (1908), wherein the Court stated, "[W]e take judicial cognizance of all matters of general knowledge." See Stern and Gressman, Supreme Court Practice § 13.11, at 717 (5th ed. 1978).

Petitioner suggests that the affidavit should not be accepted since it has not been tested in the crucible of the trial court. The information in the affidavit relates, however, solely to irrefutable facts which would not give rise to the necessity for testing in an adversary proceeding.[2] For this reason Petitioner's reliance upon Adickes v. Kress and Co., 398 U.S. 144 (1970), and Hopt v. Utah, 114 U.S. 488 (1885), is misplaced.

In his opening Brief Petitioner has asserted for the first

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[1]While Petitioner has stated that he has not attempted to determine the correctness of Mr. Gibbs' affidavit, his own representations confirm the accuracy of the affidavit. The Petitioner represents that before the parties exercised their peremptory strikes the venire was composed of 7 blacks and 13 whites. Exercising their peremptory strikes Petitioner struck 4 whites and the prosecutor struck 3 blacks and 1 white, leaving a jury composed of 4 blacks and 8 whites. (Motion, p. 7).

[2]Petitioner cites his misstatement about the race of Robert McClark as an example of why the affidavit should be struck. (Motion, p. 2 n. 1). Petitioner's failure to verify the information he furnished this Court should not bar the acceptance of admittedly correct information.

Petitioner also refers to People v. Motton, 217 Cal. Rptr. 416 (1985), for support. Rather than supporting Petitioner, this case shows why the affidavit should not be struck. In Motton the California Supreme Court incorrectly assumed that no blacks were on the jury which convicted Motton. In this case there is no reason for this Court to assume anything, as the affidavit sets forth the facts clearly and accurately.

time his reliance upon most of the ten factors he sets forth on pages 13-14 and has expanded his reliance upon the historical background of capital punishment. In view of these shifts in Petitioner's arguments Respondent has deemed it appropriate to bring to this Court's attention the actual setting in which Petitioner's trial was conducted. This was the purpose underlying the affidavit in question. Respondent feels bound to bring to the Court's attention historical facts which relate to the issues before the Court. Cf. Fusari v. Steinberg, 419 U.S. 379, 390-391 (1975) (Burger, C.J., concurring).

Petitioner urges that Mr. Gibbs' affidavit be struck since Respondent will allegedly ask the Court to use the information to speculate about what went on in the jury room. Respondent has not sought in his Brief to have this Court engage in speculation about what occurred in the jury room, nor is this the purpose of the affidavit. The affidavit simply affords the opportunity for this Court to have before it relevant information in order that its decision be based upon the indisputable facts as they existed at the time of Petitioner's trial.

The Court should not allow the Petitioner to submit the affidavits of Craig T. Haney and Thomas Woodward. Unlike the affidavit of Mr. Gibbs, the affidavits of Haney and Woodward would not be a mere recitation of indisputable fact but would consist of untested opinions and statements pertaining to the thought processes of Petitioner's trial counsel.

Respondent Allyn R. Sielaff respectfully prays that Petitioner's Motion To Strike the affidavit of Clyde Gibb be denied and further that Petitioner not be granted leave to file affidavits of Craig Haney and Thomas Woodward.

ALLYN R. SIELAFF

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MAILING CERTIFICATE

I, James E. Kulp, a member of the Bar of this Court, hereby state under oath that I have today mailed, by first class postage prepaid, ten (10) copies of the foregoing Reply to Motion to Strike Ex Parte Affidavit to the Clerk of this Court, and further that I have mailed, by first class postage prepaid, one (1) copy of the foregoing to J. Lloyd Snook, III, Esquire, 230 Court Square, Charlottesville, Virginia 22901, this 18th day of November, 1985.

James E. Kulp

STATE OF VIRGINIA

CITY OF RICHMOND, to-wit:

The foregoing was sworn and acknowledged before me this 18th day of November, 1985, by James E. Kulp.

My commission expires: 9-19-87.

Notary Public

Commissioned as Cynthia A Lee